

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CALVIN J. LEAVY, JR.,

CV F 05-00314 LJO SMS HC

Petitioner,

ORDER DENYING PETITIONER'S REQUEST
FOR CERTIFICATE OF APPEALABILITY

v.

[Doc. 26]

R. KIRKLAND,

Respondents.

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On March 29, 2007, the undersigned denied Petitioner's petition for writ of habeas corpus and judgment was entered in favor of Respondent the same day. On April 30, 2007, Petitioner filed a notice of appeal and requested that the Court issue a Certificate of Appealability. A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the

1 validity of such person's detention pending removal proceedings.

2 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an
3 appeal may not be taken to the court of appeals from—

4 (A) the final order in a habeas corpus proceeding in which the
5 detention complained of arises out of process issued by a State
6 court; or

7 (B) the final order in a proceeding under section 2255.

8 (2) A certificate of appealability may issue under paragraph (1) only if the
9 applicant has made a substantial showing of the denial of a constitutional right.

10 (3) The certificate of appealability under paragraph (1) shall indicate which
11 specific issue or issues satisfy the showing required by paragraph (2).

12 If a court denies a petitioner's petition, the court may only issue a certificate of
13 appealability "if jurists of reason could disagree with the district court's resolution of his
14 constitutional claims or that jurists could conclude the issues presented are adequate to deserve
15 encouragement to proceed further." Miller-El, 123 S.Ct. at 1034; Slack v. McDaniel, 529 U.S.
16 473, 484 (2000). While the petitioner is not required to prove the merits of his case, he must
17 demonstrate "something more than the absence of frivolity or the existence of mere good faith on
18 his . . . part." Miller-El, 123 S.Ct. at 1040.

19 In the present case, the Court finds that reasonable jurists would not find the Court's
20 determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or
21 deserving of encouragement to proceed further. Petitioner has not made the required substantial
22 showing of the denial of a constitutional right. Accordingly, the Court hereby DENIES
23 Petitioner's motion for certificate of appealability.

24 IT IS SO ORDERED.

25 Dated: May 14, 2007

26 /s/ Lawrence J. O'Neill
27 UNITED STATES DISTRICT JUDGE
28